IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1186 OF 2002

AHMED ADEYINKA ADEBAYO ...Appellant

V/s

1. NARCOTICS CONTROL BUREAU
2. The State of Maharashtra ...Respondents

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Shri Ayaz R. Khan, advocate for the appellant.

Shri D.N. Salvi, advocate for respondent No.1.

Shri A.S. Shitole, Advocate for respondent No.2.
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CORAM: V.M.KANADE,J.
DATE : 15/2/2005

ORAL JUDGEMENT:

1. The appellant is the original accused. He was charged for having committed the offences punishable under sections 8(c) read with sections 21, 23, 28 and 29 of the N.D.P.S. Act, 1985. By judgment and order dated 25/10/2002, the Special Judge acquitted the accused of the offences punishable under sections 23, 28 and 29 of the N.D.P.S. Act and convicted him for the offence punishable under section 21 of the N.D.P.S. Act, 1985 and sentenced him to suffer R.I. for 10 years and to pay fine of Rs 1 lakh and, in default of payment of fine, the accused was to further undergo rigorous imprisonment for six months. The appellant - accused was arrested on 12/08/1999 and the period of pre-trial detention was set off. The

appellant - original accused is challenging the said judgment and order in this appeal.

2. Brief facts are as under :-

3. The Officers of the Narcotic Control Bureau, Bombay (hereinafter referred to as "NCB") received information that one Ahmed A. Adebayo was likely to carry heroin in huge quantity by concealing it in his baggage or body cavity and was scheduled to travel to Addis Ababa on 5/8/1999 by Flight No. ET-641 of the Ethiopian Airlines which was scheduled to leave Mumbai Airport at 7.30 hours. After this information was received, the Officers of the NCB went to the airport on 5/8/1999 and kept watch since 4.00 a.m. They contacted two persons and requested them to act as panchas and they were informed about the information which was received by them. When the Officers of the NCB and the panchas waited for the arrival of the said person, one Nigerian National came near the Customs Counter for customs clearance. The Customs Authorities cleared him after the customs formalities were over.

4. Thereafter, the Officers of the NCB in the presence of panchas intercepted the said Nigerian

National. His Pass-port was inspected and it revealed that the name of the said person was Ahmed Adeyinka Adebayo. The panchas were informed that this was the same person in respect of whom they have received the information. The accused was taken to the baggage examination hall for the purpose of identification of the checked-in-baggage of the accused. The accused was carrying one hand baggage. The accused identified one baggage which he had checked-in and, at that point of time, NCB Officers, in the presence of panchas, explained to the accused that they wanted to take his personal search and search of his checked-in baggage and if he so desired, the search could be taken in the presence of the Magistrate or the Gazetted Officer. However, this offer was not accepted by the accused and he agreed to be searched by the said Officers.

5. Accordingly, search was taken. However, no contraband was found in his personal search or in the baggage which was carried by him. Thereafter, the Officers noticed that stomach of the accused was stiff. The prosecution case is that on inquiry being made, the accused admitted that he had swallowed some quantity of heroin which was kept in capsule and that he intended to take it to Addis Ababa.

6. The panchanama was prepared as to what had transpired at the airport and which was done in the presence of panchas. The accused then, on the same day, was produced before the Special Judge in Greater Bombay and permission was granted to medically examine the accused and direction was given to the Superintendent, J.J. Hospital to keep the accused under medical surveillance and to submit a report thereafter.

7. Thereafter, on 11/8/1999, two panchas were called in Ward No.17 of J.J. Hospital and Dr. Hrishikesh Shenoy was also present in the said Ward. The panchas were informed about the background of the case. Thereafter, the Officers of the NCB informed the panchas that the accused had purged out 108 capsules, out of which 27 were red capsules and remaining 81 were off-white colour capsules. Thereafter, capsules were examined in the presence of the panchas and it was found that they were filled with some substance in the form of powder. Out of all the capsules, one capsule was opened and, with the help of Field Testing Kit, the powder was tested and it showed that it contained Narcotic Drugs. Thereafter, all the capsules were opened and they were found to be containing heroin. The weight of the powder was 1300

grams. Out these capsules, three samples of 5 grams each were taken in small polythene bags. The powder bags were heat-sealed and the packets were kept in three separate envelopes and remaining quantity of heroin was put in one polythene bag which was heat-sealed and put in one carton box. The panchanama was signed by all the panchas and by the Officers. The accused also signed the three sample packets and also carton boxes. The medical report of the accused was handed over by Dr. Shenoy. This report was signed by Dr. P.H. Doctor of the J.J. Hospital and this was given to Shri A.J. Shaikh the complainant in the presence of the panchas. On 11/08/1999, the statement of the accused under section 67 of the said Act was recorded and the accused told them that one Mustafa of Karachi had asked him to carry the heroin to Nigeria via Mumbai and hand over the same to one Sheun and that he would be paid remuneration of 3000 U.S. Dollars.

8. On 13/08/1999, the sealed samples were delivered to Forensic Science Laboratory, Kalina, Mumbai by hand delivery alongwith a forwarding letter. On the date prior to that, the balance quantity of heroin which was sealed and put in a carton box was deposited in the godown. The charge was framed against the accused

under sections 21, 23, 29 of the N.D.P.S. Act. The accused pleaded not guilty to the said charge. The trial court accepted the evidence adduced by the prosecution and convicted him for the offence punishable under section 21 of the N.D.P.S. Act. However, the trial Court acquitted the accused of the offences punishable under sections 23, 28 and 29 of the N.D.P.S. Act.

9. The learned Counsel appearing on behalf of the appellant submitted that there was non-compliance of the provisions of section 42(1)(2) of the N.D.P.S. Act. He further submitted that there was also non-compliance of the provisions of section 50 of the N.D.P.S. Act. He further submitted that there was no evidence to indicate that the accused had purged the said capsules. He submitted that there was discrepancy in the evidence of P.W. 4 - Dr. Mr. P.H. Doctor, and the panchas in respect of the exact time and that the capsules were purged. He submitted that the story of the prosecution that the accused had swallowed 108 capsules was unbelievable particularly when the doctor took the X-rays of the accused, it showed that there were no foreign material in the body of the accused. He further submitted that the report which was submitted by the J.J. Hospital regarding

the time of purging also could not be relied upon for number of reasons. He submitted that the accused was shown to be arrested on 12/08/1999 which indicated that he was in custody illegally from 05/08/1999. In support of his submissions he relied upon the judgments of this Court and the Supreme Court which shall be considered at the appropriate stage.

10. The learned Counsel appearing on behalf of respondents vehemently opposed the said submissions. He submitted that merely because the two independent panchas did not support the prosecution case in respect of the exact time of the seizure and the preperation of the panchanama, the panchanama itself could not be discarded on this point and the Officers of the NCB had proved the panchanama. He submitted that the accused was produced before the Special Judge, Greater Bombay on 5/8/1999 who had directed that the accused should be kept under medical supervision and pursuant to the said order, he was kept under medical supervision from 5/8/1999 and after the capsules were purged on 11/8/1999, the accused was arrested on the next date. He submitted that there was no substance in the submissions made by the appellant that the accused was under illegal detention. He further submitted that merely because

no person had actually seen the accused purging the capsules, that could not destroy the prosecution case as there was evidence to indicate that the said capsules had been purged and were sent to the Chemical Analyser. He submitted that the accused had confessed about his involvement in the crime and his statement was recorded under section 67 of the N.D.P.S. Act.

11. I have heard both the learned Counsel appearing on behalf of the appellant and the learned counsel appearing on behalf of the respondents. I have perused the judgment and order of the trial court. With the assistance of the learned Counsel appearing on behalf of the appellant and the respondents, I have also perused the oral and documentary evidence on record and also the authorities on which the reliance was placed by both the counsel on either side.

12. I am of the view that the submissions made by the learned Counsel appearing on behalf of the accused will have to be accepted.

13. The prosecution in support of its case has examined in all 7 witnesses. P.W. 1 - Abdul Jalil Shaikh, who was the Investigating Officer of NCB, collected the intelligence alongwith S.S. Asawale and

apprehended the accused at the airport, produced him in the court and then admitted him in the hospital, went to Ward No.17 of J.J. Hospital, collected 108 capsules, recorded the statement of the accused and arrested him on 11/8/1999 at 22 hours. The samples were sent to the Chemical Analyser and the complaint was filed thereafter. P.W. 2 - R.V. Sawant and P.W.3 - V.S. Vasaikar are the panch witnesses at the airport. P.W. 4 - Dr. P.H. Doctor who was attached to the J.J. Hospital has admitted the accused was in Ward No.4 of the J.J. Hospital on 5/8/1999. Between 5/8/1999 to 7/8/1999, the accused purged 108 capsules. He has identified the report of Dr. Shenoy. Dr. Shenoy who had prepared the report has not been examined by the prosecution. On 6/8/1999, the accused was shifted to Ward No.17 and on 7/8/1999, he was shifted to ward No.46. P.W.5 - Mohd Salman Jamir is the panch at the hospital, who witnessed the capsules being handed over at Ward No.17 on 11/8/1999. P.W. 6 - Ramnath Murkunde is the carrier who handed over samples to Dy.C.C. and P.W. 7 is also the carrier who handed over the samples to the FSL. Thus, the evidence of P.W.1, P.W.2 and P.W.3 is relevant for the purpose of establishing whether there was compliance of the provisions of section 50 of the N.D.P.S. Act, whereas the evidence of P.W.4 and P.W.5 is important

for establishing that the accused purged the capsules which contained Narcotic substance. Since the appellant has not attacked the procedure of sealing the samples, the evidence of P.W.6 and 7 would not be relevant to that extent. Before taking into consideration the evidence of these witnesses, it will be relevant to have a brief overview about the sequence of events.

(1) On 4/8/1999 the information was received by P.W.1.

(2) On 5/8/1999, the accused was apprehended at the airport by P.W.1 in the presence of P.W.2 and P.W.3. Thereafter, he was taken to the J.J. Hospital. The capsules were purged from 5/8/1999 to 7/8/1999.

(3) The capsules were handed over to the Officers of the N.C.B. in Ward No.17 on 11/8/1999. The statement of the accused was recorded on the same day. Thereafter, he was arrested.

(4) On 12/8/1999, the samples were sent to the

FSL and Dy.C.C.

14. P.W.1 - Abdul Jalil Shaikh in his evidence has stated that after the accused was intercepted and he was taken to the baggage hall for identification of the checked-in baggage, he asked the accused whether he wanted the search of his checked-in baggage as well as personal search to be made in the presence of any Gazetted Officer or Magistrate under section 50 of the N.D.P.S. Act. P.W.1 has stated that the accused declined to accept the said offer. P.W.2 - Ravindra Sawant and P.W. 3 - Vijay Vasaikar have not stated in their evidence that P.W.1 had explained to the accused that he had right to be searched in the presence of Gazetted Officer or the Magistrate. Thus, there is a definite discrepancy in the evidence of P.W.1 and P.Ws. 2 and 3 in respect of explaining to the accused about his right to be examined in the presence of the Gazetted Officer or the Magistrate. Further, it can be seen that even at the time when the accused was taken to the J.J. Hospital, he was not informed that he had a right of purging being done in the presence of a Gazetted Officer or the Magistrate.

15. The learned Counsel appearing on behalf of the accused has submitted that even if the contraband is

kept in cavity, the provisions of section 50 would still be applicable. He also submitted that independent witness had not stated that the provisions of section 50 had been complied with. On these two points he relied upon the judgment of this Court in the case of Ahmed Adenwala Kola Vs. V.M. Dosi and another reported in **2001(2) Mh.L.J. 515**. He also relied upon the judgment of the Division Bench of this Court in the case of Shaikh Salauddin Ibrahim and anr. Vs. The State of Maharashtra Through NCB, Mumbai in Criminal Appeal No.34 of 1999 along with Criminal Appeal No. 95 of 1999 dated 9/7/2003. He also relied upon the judgment of this Court delivered by the learned Single Judge in the case of Abdullah Hussen Juma Vs. V.M. Dosi in Criminal Appeal No.213 of 1997 dated 4/12/2000. He further relied upon the judgment of this Court in the case of Shri Shiv Kumar Ashok Mishra, vs. Special Judge, N.D.P.S. Court, Mapusa-Goa (State) reported in **1996 CRI.L.J.1454** and in the case of Smt. Adilaxmi Kunder vs. The State of Maharashtra in Criminal Appeal No.274 of 2000. The learned Counsel appearing on behalf of the respondents relied upon the judgment of the Supreme Court in the case of P.P. Fatima Vs. State of Kerala reported in **2003(4) Crimes 390 SC**. Section 50 of the N.D.P.S. Act reads as under:-

"**50. Conditions under which search of persons shall be conducted.-**

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section(1).

(3) The Gazetted officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone

excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973.

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within a seventy-two hours send a copy thereof to his immediate official superior."

From the plain reading of the said section, it is apparent that it is the duty of the Officer to appraise the accused that he has a right of his search

being taken in the presence of Gazetted Officer or the Magistrate. From the perusal of the evidence of P.W.1, it can be seen that P.W.1 did not appraise the accused of his right to be searched in the presence of these two officers. P.W.1 in para 3 of his deposition has stated that he informed the accused whether he wanted his search to be taken in the presence of the Gazetted Officer or the Magistrate. This does not indicate that the accused was appraised of his right. The submission of the learned Counsel appearing on behalf of the respondents, therefore, cannot be accepted. He submitted that since the accused had declined the offer of being examined in the presence of the Gazetted Officer or the Magistrate, it could not be said that there was non-compliance of section 50 of the said Act. It is not possible to accept this submission of the learned Counsel appearing on behalf of the respondents. It was the duty of P.W.1 to have appraised the accused of his right under section 50. Apart from that P.W.2 and P.W.3 both, in their evidence, have not supported or corroborated the evidence of P.W.1 in respect of the option being given to the accused of the search being taken in the presence of the two officers as prescribed under section 50. Thus, firstly, the evidence of P.W.1 on this aspect has not been corroborated by the

independent witnesses P.W.2 and P.W.3. But, even otherwise, there is a lacuna in the evidence of P.W.1 inasmuchas that he has not appraised the accused of his right under section 50. Therefore, in my view, there is clear non-compliance of section 50 of the N.D.P.S. Act. The reliance placed by the learned Counsel appearing on behalf of the respondents on the judgment of the Supreme Court in the case of P.P. Fatima (supra) will not be applicable to the facts of the present case. In the said case 7.50 grams of brown sugar was recovered from four packets which were found in the hand-bag of the appellant and no material contradiction in the testimony of recovery witnesses was noticed to disbelieve them. Under these circumstances, the Supreme Court held that merely because the panch witnesses had not supported the case, there was no reason to reject the prosecution case, if otherwise evidence regarding seizure was acceptable. The ratio of the said case, therefore, is not applicable to the facts of the present case. Therefore, the question in that case was regarding evidence in respect of seizure and since the other witnesses having been found to be reliable, their evidence was accepted though the panch witness had not supported the case. In the present case, both the independent witnesses viz. P.W.2 and P.W. 3 have not

supported the prosecution case at all and P.W.1 also from his evidence has not appraised the accused of his right under section 50 of the N.D.P.S. Act. Apart from the aforesaid non-compliance of section 50 at the stage of personal search of the accused at the airport and of his baggage, even subsequently when the accused was produced before the J.J. hospital for medical supervision, at that time, he was not informed that he had a right as envisaged under section 50 of the said Act. Thus, either way there has been non-compliance of mandatory provisions of section 50 of the N.D.P.S. Act.

16. The learned Counsel appearing on behalf of the respondents has submitted that in respect of search of a person in cases where the contraband is concealed in the body cavity, the provisions of section 50 would not apply. The learned Single Judge of this Court in the case of Ahmed Adenwala Kola vs. V.M. Dosi and another reported in **2001(2) Mh.L.J. 515** has held that search of body cavity or inside of the abdomen of a person amounts to personal search and, therefore, the provisions of section 50 of the N.D.P.S. Act are attracted. Similarly, Division Bench of this Court in its judgment in Criminal Appeal No.34 of 1999 (Shaikh Salauddin Ibrahim Vs. The State of Maharashtra

Through NCB, Mumbai) and Criminal Appeal No.95 of 1999 (T.T. Balchandran Vs. Sayyed Haji Baitullah) has held that section 50 is attracted when the contraband is inside the body of the person and that if there is non-compliance of the said provisions, the accused was liable to be acquitted. In my view, the ratio laid down by the Division Bench of this Court in the aforesaid judgment in Criminal Appeal No.34 of 1999 is squarely applicable to the facts of the present case. The Supreme Court in the case of Narcotics Control Bureau, Mumbai V. Abdullah Hussain Juma & Anr. reported in **JT 2003(6) SC 450** has held that if there is no evidence that sachets were purged by the accused, the prosecution has failed to establish that the sachets belonged to the accused.

17. For the aforesaid reasons, in my view, there is clear non-compliance of section 50 of the N.D.P.S. Act and the accused is liable to be acquitted on this ground alone.

18. Apart from non-compliance of provisions of section 50 of the N.D.P.S. Act, in my view, the prosecution has not established that the capsules which were produced before the panchas in the hospital were purged by the accused and there is no evidence on

record to establish this fact. In respect of purging of the capsules, the prosecution has relied upon the evidence of P.W. 1 - Abdul Jalil Shaikh and P.W. 4 - Dr. P.H. Doctor who was the doctor attached to J.J. Hospital, P.W. 5 - Mohd. Salman Jamir who was the panch witness regarding panchanama made at the hospital. P.W. 1 - Abdul Jalil Shaikh who was the Investigating Officer of N.C.B. has stated in his evidence that he went to Ward No.17 of J.J. Hospital and collected capsules. He has stated that one Dr. Rushikesh Shenoy introduced himself and showed that 108 capsules were purged out by the accused. He has stated that he reached the J.J. Hospital at about 1.30 p.m. on 11/8/1999 and he approached two persons and requested them to act as panch witnesses. He also told the panch witnesses that the accused has purged out 108 capsules. The capsules were then examined and they noticed that they were filled with some powder and one capsule was opened with the surgical blade and they noticed that the capsule was wrapped by off white insulation tape and inside that there was milky colour small polythene pouch in which off white powder was noticed. After testing the off white powder with the Field Testing Kit, they noticed that there was presence of narcotic drug. All the capsules were then tested and the total weight of the heroin found was

about 1300 grams. He has stated that after the panchanama was made and the samples were taken, Dr. Shenoy gave medical report in which the details of the capsules purged out from the body of the accused were given. The report was signed by Dr. P.H. Doctor. The panchanama was over at 3.30 p.m. and a copy of the panchanama was given to the accused. P.W. 4 - Dr. P.H. Doctor who was attached to the J.J. Hospital has stated that Ward No.17 and 11 in J.J. Hospital was under his control and Ward No.11 was female ward and Ward No.17 was the male ward. He has stated that the accused was admitted on 5/8/1999. The X-ray of the patient was taken on the same day and the report was brought on 5/8/1999. He has stated that the report was in the hand-writing of the radiologist who has taken the X-ray. P.W. 4 has further stated that the patient was shifted to Ward No.17 on 6/8/1999 and again to Ward No.46 on 7/8/1999 and he was discharged on 11/8/1999. After examining the papers, he stated that the accused had discharged 108 capsules. He has stated that Dr. Rushikesh Shenoy was working under him in the same Unit and Dr. Shenoy has made some entries and one entry was signed by him (P.W.4). He has further stated that the hospital authorities had not maintained X-ray plates and Sonography plates but they had maintained the report

and because of the heavy workload the hospital did not maintain the record. In the cross-examination, he has admitted that the X-ray indicates that there was no foreign body in the person of the accused and that he had not made further visits except on 11/8/1999. He has stated that the Sonography plates were not available but the X-ray plates would be available. Further in the cross-examination, he has admitted that the patient was shifted to Ward No.46 on 7/8/1999 at 1 p.m. and he was never taken back to Ward No.17 after he was shifted in Ward No.46. The prosecution has not examined Dr. Rushikesh Shenoy who prepared the report regarding the purging of the capsules by the accused. P.W. 4, admittedly, had not visited the hospital after 5th and 6th August, 1999 and he had not witnessed the purging of the capsules. Even in the examination-in-chief, he has stated that the X-ray report of the accused dated 5/8/1999 showed that there was no foreign body found in the body of the accused. Further he has stated that the accused was never brought back to Ward No.17. P.W. 4 further in his examination-in-chief also has admitted that the accused denied having capsules in his body. P.W. 5 - Mohd. Salman Jamir also in his evidence has stated that after the accused had purged the capsules which were shown to them, the samples were taken. P.W.5 in

his evidence has stated that these capsules were given in Ward No.17. From the evidence of P.W. 4, P.W.1 and P.W.5, it can be seen that on the one hand P.W.1 and P.W.5 have stated that the capsules were given in Ward No.17 and the panchanama was signed by the accused and by these two witnesses in the said ward and, however, on the other hand, P.W. 4 has admitted in his cross-examination that the accused was never brought in Ward No.17 after 7/8/1999. In view of this clear contradiction in the evidence of P.W.4, P.W.1 and P.W.5, it becomes doubtful whether the capsules were, in fact, handed over in Ward No.17. The panchanama, therefore, which was prepared in Ward No.17 dated 11/8/1999 also cannot be relied upon. P.W. 4 - Dr. P.H. Doctor is an independent witness and he has no reason to make an incorrect statement regarding the place where the accused was kept after 7/8/1999. Thus, from all this evidence it can be seen that not a single witness has been examined by the prosecution who has allegedly seen the accused purging the capsules. P.W.4 also has neither seen any purging nor he has any personal knowledge regarding the purging. Thus, there is a serious lacuna in the prosecution case on this aspect. The Division Bench of this Court also in the case of Shaikh Salauddin Ibrahim (supra) has held that if there is no evidence

to show that the capsules had been purged by the accused then the benefit would go to the accused and that under the circumstances in the said case it was held that the prosecution has not established beyond the reasonable doubt that the contraband in question was recovered from the possession of the accused. The ratio of the said judgment, in my view, squarely applies to the facts of the present case.

19. In the result, it will have to be held that the prosecution had failed to establish that the capsules which were produced in Ward No.17 were purged by the accused and, therefore, seizure of the capsules from the accused has not been established beyond the reasonable doubt.

20. For the aforesaid reasons, the appeal is allowed. Judgment and Order passed by the trial court is set aside. Accused is acquitted of the offence with which he was charged. The appellant - accused be released forthwith unless he is required in any other case. Passport of the appellant be returned to the appellant.

**(V.M. KANADE, J.)**